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CITATIONS

Miscellaneous—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 233

JAMES R. WASHER, EXECUTOR, ESTATE OF BENJAMIN SEELIG WASHER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 15) is unreported. The opinion of the Circuit Court of Appeals (R. 58–63) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 16, 1942 (R. 58). The petition for a writ of certiorari was filed July 15, 1942. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the proceeds of certain policies of insurance on the life of the decedent (after allowance of the $40,000 exemption) are includible in his gross estate for purposes of the federal estate tax under Section 302 (g) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set out in the Appendix, *infra,* pp. 10–18.

STATEMENT

The facts as stipulated (R. 25–52) and found by the Board of Tax Appeals (R. 15), supplemented by the pleadings (R. 4–14), may be summarized as follows:

The decedent, Benjamin S. Washer, died February 5, 1935, a resident of Kentucky. James R. Washer is the executor of his estate (R. 4, 13, 25).

At various times between 1905 and 1932, the decedent took out fourteen policies of insurance on his own life in The Northwestern Mutual Life Insurance Company and four in John Hancock Mutual Life Insurance Company (R. 27–28); the effective dates and face values of those policies, as listed in the record, were as follows (R. 32):

The Northwestern Mutual Life Insurance Company

Effective date:	Amount
Nov. 29, 1905	$2,000.00
Aug. 28, 1911	3,000.00
Sept. 8, 1911	2,000.00
Aug. 9, 1913	6,000.00
May 25, 1917	10,000.00
Jan. 9, 1919	7,000.00
June 30, 1921	10,000.00
June 30, 1921	10,000.00
Jan. 17, 1922	3,000.00
Aug. 1, 1923	10,000.00
Sept. 28, 1923	10,000.00
Dec. 24, 1925	15,000.00
Nov. 25, 1929	12,000.00
Jan. 20, 1930	23,000.00

John Hancock Mutual Life Insurance Company

Effective date:	Amount
July 7, 1937 [1]	$5,000.00
May 6, 1929	10,000.00
Feb. 16, 1932	10,000.00
Feb. 16, 1932	40,000.00

The original beneficiary under each of the policies was Amy D. Washer, the decedent's wife (R. 28, 29).

The decedent reserved the right to change the beneficiary and the manner of payment, to borrow upon security of the policies and to surrender the same for their cash value. (Unprinted minutes of Board proceedings, p. 15;[2] also R. 35, 37, 42, 43, 45.)

On December 19, 1932, the following endorsement was affixed to the Northwestern policies (R. 36):

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[1] This date is incorrect; the correct date is July 7, 1927.

[2] The parties stipulated (R. 52) that the stenographic transcript of the Report of Proceedings before the Board, item 6 of the Amended Designation of Contents of Record on Review (R. 53), was not to be printed, but might be referred to by either party to the same extent as if printed.

EXHIBIT E

Milwaukee, Wis., Dec. 19, 1932. The insured hereby waives the power to exercise the rights and privileges conferred upon him by the terms of this policy without the written consent of Amy D. Washer, wife and beneficiary. In event of the death of said Amy D. Washer before this policy shall become payable, the power to exercise such rights and privileges shall vest solely in the insured. All policy provisions inconsistent herewith are suspended.

H. R. RICKER, *Asst. Secretary.*

With respect to the Hancock policies, the decedent, on January 18, 1933, waived the right to change the beneficiary or method of payment without the consent of his wife during her lifetime, still reserving, however, the right to change the contingent beneficiaries from time to time; decedent also reserved the right (but only with the consent of his wife during her lifetime) to procure loans upon the policies or to surrender them for their cash value and to make any changes without consent of the contingent beneficiaries (R. 46, 48).

On December 17, 1934, another endorsement was affixed to the Hancock policies which provided that the decedent could change the contingent beneficiaries only with the written consent of the wife during her lifetime (R. 49).

At the date of death of the decedent the policies provided that the proceeds be held by the insurer and that interest be paid thereon to the wife during her life and then to the two sons during their lives. Upon death of either son, leaving children surviving, the share of that son was to be paid in one sum to his children. In the event that the insured's wife should survive the sons and their children, she was to have the privilege of receiving the proceeds in annual installments and, upon her death, the proceeds then in the company's hands were to be commuted and paid to the decedent's estate (R. 38–40, 49–52, 28–29).

The decedent left surviving him his wife and his two sons, Benjamin S. Washer, Jr., 29 years old at the time of the decedent's death, and James R. Washer, then 25 years old. James R. Washer was then married and had a child three years of age; another child was born shortly thereafter. All of such persons were living at the time the stipulation of facts was filed (R. 29).

At the date of decedent's death, there was insurance under the Northwestern policies in the aggregate face amount of $123,000, plus additions of $201 and post mortem dividends of $1,225.17, and insurance under the Hancock policies in the aggregate face amount of $65,000, plus additions of $285.10 and post mortem dividends of $284.40, or a total of $189,995.67, all on the life of the decedent. The Commissioner, in determining the deficiency, in-

cluded the foregoing amounts in the gross estate (together with other insurance not here in controversy) to the extent that the aggregate was in excess of $40,000 (R. 27–28).

Upon review, the Board of Tax Appeals held that such action of the Commissioner was erroneous, but the court below reversed the decision of the Board.

DISCUSSION

Since the insured retained rights and powers in all the policies which he could exercise in the event that he should survive his wife, the proceeds of these policies must be included in his gross estate under Section 302 (g) of the Revenue Act of 1926. The retention of those rights, based upon the contingency of survivorship, brings this case within the principles of *Helvering* v. *Hallock,* 309 U. S. 106. True, this Court had once held that such policies were not taxable in *Bingham* v. *United States,* 296 U. S. 211, and *Industrial Trust Co.* v. *United States,* 296 U. S. 220.[3] But both these cases rested

[3] There was also an alternative ground for the decision in the *Bingham* and *Industrial Trust Co.* cases, namely, that all the policies in question had been taken out and the rights therein had become irrevocably fixed long before the enactment of the first Federal estate tax law which specifically taxed insurance proceeds (the Revenue Act of 1918). Indeed, Justices Brandeis, Stone, and Cardozo concurred specially upon that ground.

That alternative ground can have, of course, no application here. Not only were the great bulk of the policies in the instant case taken out after the 1918 Act, but even as to those taken out before, the insured had retained rights to change

upon *Helvering* v. *St. Louis Trust Co.*, 296 U. S. 39, and *Becker* v. *St. Louis Trust Co.*, 296 U. S. 48, which were overruled in the *Hallock* case. And since the decision in the *Hallock* case, the lower courts have assumed that the principles there laid down destroyed the basis for the *Bingham* and *Industrial Trust Co.* decisions, and have ruled that the *Hallock* case applies to render insurance proceeds taxable where the decedent retained rights based upon survivorship.[4] See, particularly, dis-

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beneficiaries, surrender for cash, etc., which he relinquished for the first time in 1932, long after the enactment of the relevant statutes.

[4] The case for taxing the insurance proceeds where the insured has retained rights based upon survivorship is much stronger than the case of the trusts involved in the *Hallock* case. For, Section 302 (g) in sweeping terms requires the proceeds of all policies of life insurance taken out by the decedent to be included in his gross estate. Nowhere in the provisions of Section 302 (g) is there any requirement that the insured shall have retained rights of any character in the policies. The critical consideration is that life insurance is *per se* a substitute for a testamentary disposition, and under the all-inclusive language of Section 302 (g) it should not matter whether the insured has retained rights in the policies. In the case of an ordinary *inter-vivos* trust, the existence of such rights may be necessary to convert an otherwise non-testamentary disposition into one that is a substitute for the transfer of property at death. But in the case of life insurance, the very nature of the transaction marks it as a substitute for a testamentary disposition, and there is no reason why the obvious intention of Congress as expressed in Section 302 (g) should not be given effect.

However, in view of the unsatisfactory state of the Treasury regulations prior to 1941 with respect to this broad position, the Government is not anxious to press that point in this

cussion by Judge A. N. Hand in *Chase Nat. Bank* v. *United States,* 116 F. (2d) 625 (C. C. A. 2d). Cf. *Bailey* v. *United States,* 31 F. Supp. 778 (C. Cls.); *Broderick* v. *Keefe,* 112 F. (2d) 293 (C. C. A. 1st).

Thus, although it is true that there may technically be a conflict in principle with the *Bingham* and *Industrial Trust Co.* decisions and with decisions of the lower courts following those cases (e. g., *Walker* v. *United States,* 83 F. (2d) 103 (C. C. A. 8th)), the basis for that conflict has been removed by the *Hallock* case, and we know of no decision to

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case. Prior to 1929, the regulations shed very little, if any, light upon the issue. See Articles 32, 34–35, Regulations 37; Articles 27, 29–30, Regulations 63; Articles 25, 27, Regulations 68; Article 27, Regulations 70 (1926 Ed.). But in Article 27 of Regulations 70 (1929 Ed.) it was specifically provided that insurance might be taxed irrespective of the retention of legal incidents of ownership. These provisions, however, were withdrawn on August 6, 1930, by T. D. 4296, IX–2 Cum. Bull. 427. See also T. D. 4331, XI–1 Cum. Bull. 330; Article 25, 27, Regulations 80 (1934 and 1937 Eds.). On January 10, 1941, the Treasury undertook to eliminate the confusion that had theretofore existed on this broad question by promulgating a ruling that the statute would be applied to the proceeds of all policies of insurance taken out by the decedent, irrespective of the retention of so-called incidents of ownership; but in recognition of the pre-existing confusion, the new ruling was issued so as to have prospective effect only. T. D. 5032, 1941–1 Cum. Bull. 427; Articles 81.25, 81.27, Regulations 105.

Accordingly, the Government expects to raise the broad issue in cases arising under the new regulations, but it is not necessary to do so here, for, the decedent in this case in fact retained rights based upon survivorship, so that the principles of the *Hallock* case apply here in any event.

the contrary subsequent thereto. In these circumstances, we think that it is unlikely that any lower court will now reach a result contrary to the decision herein, and that therefore there is not such a conflict as to call for review by this Court.

Although the petition raises various other questions, including the scope of review in the court below, none of them appears to have any merit and they certainly do not warrant certiorari.

Respectfully submitted,

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AUGUST 1942.